BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GEORGINA RENE ADAMI	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,013,188
HUSCH & EPPENBERGER	)	
Respondent	)	
AND	)	
	)	
AMERICAN PROTECTION INSURANCE COMPANY	)	
(aka AMERICAN MOTORIST INSURANCE	)	
COMPANY, aka LUMBERMENS MUTUAL	)	
CASUALTY COMPANY), and TWIN CITY FIRE	)	
INSURANCE COMPANY (aka THE HARTFORD)	)	
Insurance Carriers)		

ORDER

Respondent and its insurance carriers American Protection Insurance Company and Twin City Fire Insurance Company appeal the February 7, 2005 Award of Special Administrative Law Judge (SALJ) Marvin Appling. Claimant was awarded benefits for a 28 percent functional disability for injuries suffered through October 31, 2004 [sic]. Oral argument was held on June 17, 2005, in Wichita, Kansas.

APPEARANCES

Claimant appeared by her attorney, Andrew E. Busch of Wichita, Kansas. Respondent and its insurance carrier American Protection Insurance Company, aka American Motorist Insurance Company, aka Lumbermens Mutual Casualty Company,[1] appeared by their attorney, P. Kelly Donley of Wichita, Kansas. Respondent and its

[1] The insurance carrier American Protection Insurance Company, which is also known as American Motorist Insurance Company, and further also known as Lumbermens Mutual Casualty company, hereinafter will be referred to in this Order as "American."

insurance carrier Twin City Fire Insurance Company, aka the Hartford,[2] appeared by their attorney, Richard L. Friedeman of Great Bend, Kansas.

RECORD AND STIPULATIONS

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the SALJ. Additionally, the parties acknowledged that the date of accident listed in the Award as October 31, 2004, is incorrect as claimant's last day worked with respondent was October 31, 2003. The parties additionally stipulated that the $50,000 cap contained in K.S.A. 44-510f would apply to this matter. The parties further agreed that with a date of accident of October 31, 2003, the statutory maximum of $440 for temporary and permanent disability benefits would apply. Finally, the parties stipulated that American provided insurance coverage from April of 2002 through April of 2003. As of April 5, 2003, Twin City began providing workers compensation protection for respondent.

ISSUES

1. What is the nature and extent of claimant's injury? The parties agree claimant is limited to a functional impairment, having obtained employment with a different law firm performing the same activities and at a comparable wage.

2. What is the appropriate date of accident?

3. Did claimant suffer accidental injury arising out of and in the course of her employment with respondent on the dates alleged?

4. Did claimant provide timely notice of accident?

5. Against which insurance carrier should this award be ordered?

6. Was the award properly computed?

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[2] The insurance carrier Twin City Fire Insurance Company, which is also known as the Hartford, hereinafter will be referred to in this Order as "Twin City."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds as follows:

Claimant, an attorney, worked for respondent in its law office for approximately five years in Wichita, Kansas. During this time, she began developing problems with her upper extremities, alleging difficulties with her hands, wrists, elbows, shoulders and neck. Claimant blamed her symptomatology on poor equipment and a badly arranged work station. Claimant testified that she complained to the employer on several occasions about the furniture and equipment, but was provided little or no relief. She was allowed to use an old conference room chair the last few months of her employment and ultimately a keyboard tray was placed under her desk, but claimant's symptoms did not abate.

Claimant was, after numerous complaints, referred for medical treatment to board certified orthopedic surgeon George L. Lucas, M.D., with the first examination occurring on August 27, 2003. Dr. Lucas provided treatment for claimant over a several-month period, referring claimant for nerve conduction studies, which showed mild changes suggestive of median nerve difficulties at the wrist. Claimant also had a positive Tinel's sign on the right, negative on the left, with the positive Tinel's on the right being both at the ulnar groove and at the median nerve. Dr. Lucas recommended an injection into claimant's carpal canal, which claimant declined. He also diagnosed crepitus in the acromioclavicular joint in her shoulders bilaterally and trapezius tenderness. He indicated the shoulder examination was otherwise negative.

Dr. Lucas assessed claimant a 5 percent permanent partial impairment to each upper extremity, which converts to a 3 percent impairment to the body as a whole, which when combined, computes to a 6 percent permanent partial impairment to the body as a whole pursuant the AMA *Guides*, Fourth Edition.[3] He found full range of motion, with slight tenderness in claimant's neck, but no spasm, and assessed no impairment to claimant's neck as a result of her employment with respondent. Dr. Lucas, when asked about myofascial pain syndrome, testified that he had never made the diagnosis and he considered it to be kind of a wastebasket diagnosis which is made when nothing more specific can be found. Dr. Lucas acknowledged that both Lee Dorey, M.D. (a board certified orthopedic surgeon who saw claimant at the request of her attorney) and Pedro A. Murati, M.D. (board certified in physical medicine and rehabilitation, who also examined claimant at the request of her attorney) read x-rays indicating cervical spondylosis at C5-6. Dr. Lucas agreed that finding could account for claimant's neck symptoms. Dr. Lucas acknowledged the type of work performed by claimant and the facilities where she was required to work could make her neck sore, as well as making the shoulder sore. However, he assessed claimant no permanent impairment rating relative to her neck from the

[3] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

employment activities with respondent. When asked to explain the cause of claimant's neck and shoulder symptoms outside of the workplace, he testified that when he first saw claimant, she had recently delivered a baby and that carrying a baby around would probably give claimant as much difficulty with her shoulders as any of the duties she had performed for respondent. It was stated at the time of Dr. Lucas's deposition in October of 2004, that claimant's baby had just had her second birthday. Dr. Lucas went on to testify that at the time of his examination of claimant's neck, she had no positive findings, therefore, leading to a zero percent rating. The same applied to claimant's shoulders, which he did not associate with any activities at claimant's work.

Dr. Lucas last examined claimant on October 15, 2004, at which time he determined the above discussed functional impairment.

Claimant was referred on February 6, 2004, to Dr. Dorey by her attorney. Dr. Dorey testified that claimant had symptoms of pain and numbness in her hands, elbows and shoulders, as well as pain in her neck, but was unable to elicit any indication of myofascial pain syndrome during his examination. He was provided copies of the nerve conduction studies of December 5, 2003. He diagnosed carpal tunnel syndrome bilaterally, which he described as being very mild; ulnar neuritis on the right side, which he described as being very mild; and cervical spondylosis at C5-6 level, which he described as moderate. He felt claimant's carpal tunnel syndrome bilaterally and ulnar neuritis were related to her employment with respondent, but did not believe the cervical symptoms to be related to her employment. He assessed claimant a 9 percent impairment to the body as a whole for her work-related injuries based upon the AMA *Guides*, Fourth Edition.[4] He testified that her neck and shoulder pain was probably related to the cervical spondylosis, which was neither caused nor contributed to by her work. When asked on cross-examination, he stated that it was plausible that a person having to bend his or her neck to look down could cause pain if he or she had cervical spondylosis, but did not say so within a reasonable degree of medical probability.

Claimant was then examined on May 25, 2004, by Dr. Murati, again at the request of her attorney. Dr. Murati diagnosed claimant with bilateral carpal tunnel syndrome; bilateral ulnar neuropathies, either at the wrist or the elbow; right shoulder pain secondary to severe AC crepitus; and myofascial pain syndrome in the right shoulder extending into the cervical paraspinals.[5] He assessed claimant a 28 percent whole person impairment pursuant to the AMA *Guides*, Fourth Edition,[6] all of which he attributed to claimant's work

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[4] *Id.*

[5] The word "paraspinals" is not in *Webster's II New Riverside University Dictionary* nor is it in *Dorland's Illustrated Medical Dictionary* (28th ed.). However, Dr. Murati uses this word in his report and throughout his testimony.

[6] AMA *Guides* (4th ed.).

with respondent. After leaving respondent on October 31, 2003, claimant went to work for a different law firm, performing the same duties she performed at respondent's office, although with new office equipment, including an adjustable desk chair and a keyboard tray.

In the Award, the SALJ adopted Dr. Murati's 28 percent whole person impairment and assessed the award two-thirds against American and one-third against Twin City, finding that American was on the coverage for twelve months, with Twin City being on the coverage for a period of approximately six months during the period claimant was being examined and treated by the various health care professionals. Respondent American argues that even if claimant suffered accidental injury, the date-of-accident case law in microtrauma situations would control, with the ultimate date of accident being the last day claimant performed work for respondent. Thus, the split of the award would be inappropriate.

In workers compensation litigation, it is the claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.[7]

With regard to whether claimant suffered accidental injury arising out of and in the course of employment, the Board finds that claimant satisfied her burden of proof that she suffered accidental injury to her bilateral hands and arms while employed with respondent. The opinions of Dr. Lucas and Dr. Dorey that claimant's neck and shoulder symptoms do not stem from her employment with respondent carry greater weight than does the opinion of Dr. Murati. The Board determines that the opinion of Dr. Murati, when compared to that of Dr. Lucas and Dr. Dorey, appears out of line. The Board, therefore, finds that claimant has suffered accidental injury arising out of and in the course of her employment to her hands and arms, but excluding the shoulders and neck, while employed with respondent. The Board finds that claimant has suffered a 9 percent impairment to the body as a whole for the injuries suffered through October 31, 2003.[8]

In considering the appropriate date of accident, the Board, in reviewing the lengthy history of cases from the appellate courts beginning with *Berry*[9] and continuing through *Treaster*,[10] holds that in microtrauma situations such as this the appropriate date of

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[7] K.S.A. 44-501 and K.S.A. 2003 Supp. 44-508(g).

[8] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

[9] *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

[10] *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

accident would be claimant's last day worked, that being October 31, 2003.[11] The Board finds that with October 31, 2003, as the appropriate date of accident, the statutory limitation limiting both temporary and permanent benefits to $440 would apply to this date of accident.

The parties acknowledged that claimant provided notice of accident in July 2003. Pursuant to K.S.A. 44-520, claimant's notice of accident would be timely for an accident of October 31, 2003.

Additionally, with a date of accident of October 31, 2003, the Board finds the determination by the SALJ that the award should be split between the insurance companies is inappropriate, with the insurance company on coverage as of October 31, 2003, Twin City, being the appropriate payor in this litigation.

Wherefore, the Board finds that the Award of SALJ Marvin Appling should be modified to award claimant a 9 percent impairment to the body as a whole for the injuries suffered through October 31, 2003, to be paid at the maximum applicable benefit rate of $440.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge Marvin Appling dated February 7, 2005, should be, and is hereby, modified and claimant is awarded a 9 percent impairment to the body as a whole for the injuries suffered with respondent through October 31, 2003.

Claimant is awarded 37.35 weeks of permanent partial general disability compensation at the rate of $440 per week totaling $16,434. As of the date of this award, the entire amount is due and owing and ordered pain in one lump sum, minus any amounts previously paid.

In all other regards, the Award of the Special Administrative Law Judge is affirmed insofar as it does not contradict the findings contained herein.

IT IS SO ORDERED.

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[11] The Board acknowledges the stipulation by the parties that the date of accident of October 31, 2004, in the Award is typographically incorrect and the appropriate date of accident, if using the last day, would be October 31, 2003.

Dated this ____ day of July 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Andrew E. Busch, Attorney for Claimant
P. Kelly Donley, Attorney for Respondent and its Insurance Carrier (American)
Richard L. Friedeman, Attorney for Respondent and its Insurance Carrier (Twin City)
Marvin Appling, Special Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director